IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 675

JOHN T. DEMPSEY, AS ADMINISTRATOR OF THE ESTATE OF GABRIEL DE FONTARCE, DECEASED,

Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK, A CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Dated February 26, 1944.

THE BUNTHORP-WARREN PRINTING COMPANY, 230 WEST JACKSON, CHICAGO

INDEX.

Subject Index.

TABLE OF CASES CITED.

Statutes and Rules Cited.

Treatises and Law Review Articles Cited.

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To the Honorable, the Supreme Court of the United States:

Opinion Below.

The opinion of the Circuit Court of Appeals, rendered on November 12, 1943, and set out in the record on pages 141-148, is reported at 138 F. (2d) 663 (C. C. A. 7th, 1943, Advance Sheets, January 3, 1944).

Jurisdiction.

Petitioner seeks a writ of certiorari under Section 240 of the Judicial Code (28 U. S. C. A. § 347).

We submit that petitioner's assertion that the decision of the Circuit Court of Appeals "directly conflicts, upon

a question of Federal law, with all of the decisions of this Court and all of the other Circuit Courts of Appeals" (P. 5) is a gross misstatement, supported by not a single case in petitioner's brief. We submit that the decisions of the District Court and the Circuit Court of Appeals are in accord with the decisions of this Court, with all the authority upon the question decided therein and with sound legal principles. We further submit that these decisions and authority are so clearly correct in the premises that they furnish no justification whatsoever for the granting of the writ sought herein and the exercise by this Court of its jurisdiction to review.

Statement of the Case and Question Presented.

Because petitioner's "Summary Statement of Matters Involved" (P. 1-5) omits the bulk of the facts shown by the record and contains at least one misleading statement which is vital to the case, we are compelled to state the facts in respondent's brief, pursuant to Rule 27(4) of the Rules of this Court (28 U. S. C. A. following § 354). In doing so we follow to a great extent the statement of the case in the opinion of the Circuit Court of Appeals (R. 141-146).

The suit in the case at bar was brought in the District Court of the United States for the Northern District of Illinois, Eastern Division, by the Illinois ancillary administrator of the estate of a non-resident alien decedent to gain possession of shares of stock of South African gold mining corporations left for safekeeping during his lifetime in the custody of respondent in New York (R. 1-10, 36). The orders of the District Court appealed from, and to review the affirmance of which this writ is sought (1) denied petitioner's motion, based on his amended and supplemental complaint, as amended, for a temporary re-

straining order and a preliminary injunction forbidding respondent to dispose of these securities until the further order of the court and preventing respondent from instituting or participating in any probate proceedings whatsoever except in the Probate Court of Cook County, Illinois, and (2) allowed respondent's motion to dismiss the amended and supplemental complaint, as amended, for failure to state grounds upon which relief could be granted. The orders were entered as of November 18, 1942 (R. 113-114).

The decedent was the Vicomte Gabriel de Fontarce, a French national and adherent of General de Gaulle (R. 4). He died in London, England, in June, 1941 (R. 35). He had not lived in France for many years prior to his death, but he was at the time of his death domiciled either in Great Britain, Egypt, Eire or France (R. 4-5). He left property in many parts of the New and Old World, including the securities involved in this controversy, which were deposited with respondent in New York City in November, 1940, and have remained in its vaults in that city since that date (R. 4-5, 36, 89). They consist of the following bearer shares:

1,000 Anglo-American Corporation of South Africa, Ltd.
6,500 Government Gold Mining Areas (Moderfontein Consolidated, Ltd.),
4,000 Randfontein Estates Gold Mining Co.,
12,000 African and European Investment Co., Ltd.

(R. 3, 13, 36, 84, 89.)

The stocks are known as "kaffirs," and they are treated by South African law as tangible property, and title to them passes by manual delivery, without endorsement (R. 4).

In September, 1941, a niece of the decedent who resided in New York filed her petition in the Surrogate's Court

for the County of New York for letters of administration on the estate of the decedent (R. 35), averring that the decedent died in June, 1941, a resident of either Great Britain or Eire (R. 35); that no will had been found disposing of his possessions in the United States (R. 35-36); that decedent died possessed of certain personal property in New York of a value not to exceed $120,000, listing the securities referred to above (R. 36); that he left him surviving, in addition to the petitioning niece, the following:

Maurice de Fontarce, age about 25, last heard of in occupied France,

Henri de Fontarce, age about 23, whose address was given in Brazil,

Jean Pierre de Fontarce, age about 39, last heard of in Morocco in 1933 (R. 37).

The relationship of these persons to the decedent was not defined, and the petition stated that decedent left no widow, child, issue of deceased child, or adopted child, and no other relatives than the four referred to above (R. 37).

Thomas Hart Fisher, a Chicago attorney (R. 48), represented the niece (R. 94, 100), and in the proceedings in the Surrogate's Court testified as to heirship and submitted an affidavit arguing that the decedent died intestate (R. 44-46, 48-49).

That application for letters was denied on November 27, 1941, for the reason that the record disclosed that decedent had left an English will, expressly limited to the disposition of his property in England and Ireland, in which he stated that his will dealing with his general estate was deposited with Maitre Eymin, notary, in the Principality of Monaco (R. 53-55). The Surrogate, in denying the application, stated that under the circumstances, the possible existence of a valid will disposing of the general estate, including the assets in New York, could not be ignored, and that although wartime conditions might delay

the obtaining of accurate information from the notary in Monaco, it was important that the existence or non-existence of the will be established, and also whether, if it were in existence, it was valid or invalid under the law of that principality (R. 54-55). He suggested alternative means for obtaining the necessary information, and stated that in the meantime, final disposition of the application would be held in abeyance (R. 55). (*In re de Fontarce's Estate*, 178 Misc. 10, 32 N. Y. S. (2d) 941.) This proceeding was still pending in November, 1942, according to the certificate of the clerk of the Surrogate's Court (R. 52).

On December 30, 1941, letters of administration were granted to The Trust Company of Chicago by the Probate Court of Cook County, Illinois, on the petition of Thomas Hart Fisher, an alleged creditor (R. 56-57), showing a waiver of the right to administer filed by the public administrator (petitioner herein), and an acceptance by The Trust Company of Chicago of the appointment if made (R. 58). According to the petition, the decedent left no will "effective in Illinois" and the estate consisted wholly of personal property of a value not to exceed $250 (R. 57). Thomas Hart Fisher and Norman Crawford entered their appearance as attorneys for The Trust Company of Chicago (R. 58). Proof of heirship was made on that day by the niece who had filed the New York application for letters (R. 62-63). In reply to a question as to whether the decedent had adopted any children she stated that she did not know, that, "He said he had two adopted sons" (R. 63). She did not mention the three persons listed in the New York petition (R. 37). Hence the proof of heirship showed that decedent's only heirs at law and next of kin, if any, and if living, were unknown; their names and addresses were unknown, and had not been ascertained upon due and diligent search and inquiry (R. 65-66). The niece who filed the petition in New York and who testified

in the Cook County proceeding was not mentioned in the declaration of heirship (R. 65-66).

Subsequently, on February 13, 1942, The Trust Company of Chicago was allowed to resign as administrator, and petitioner, the public administrator of Cook County, was appointed administrator *de bonis non*, with a direction to pay The Trust Company of Chicago $50 for its services (R. 69-70). On the same day, the Probate Court also allowed the claim of Thomas Hart Fisher, the creditor on whose petition the letters issued, for $7,513.77, for services found to have been rendered for decedent prior to his death (R. 71-72). On March 3, 1942, before the inventory was filed, the Probate Court authorized petitioner to file suit in the United States District Court for the Northern District of Illinois, against respondent, to recover the securities heretofore referred to, and to employ Norman Crawford as his attorney in the prosecution of that suit and to pay him 25% of anything recovered by such suit for his services (R. 79).

On March 9, 1942, more than sixty days after the issuance of letters, the Probate Court approved the inventory filed in the proceedings showing assets consisting of one trunk and various articles of wearing apparel and medicines of a total value of $50.25, and the kaffirs (value unknown) as the only property of the estate which had come to the sight or knowledge of the administrator (R. 81-83). The record also shows that on January 2, 1942, three days after the filing of Fisher's petition for letters of administration, and two months prior to the filing of the inventory, two trunks which had been received by the Harvard Club of New York for storage for the Vicomte de Fontarce on April 14, 1941, were taken from storage there by the Railway Express Company at the request of Fisher and checked on his railroad ticket to Chicago (R. 90-91). The record does not disclose whether one of these trunks formed the basis for

the averment of property in Cook County upon which the letters of administration were granted December 30, 1941, and if so, why the second one was not also included in the inventary approved March 9, 1942 (See R. 144).

Pursuant to the authority granted March 3, 1942, by the Probate Court of Cook County, petitioner filed his bill of complaint against respondent on March 7, 1942, attaching thereto as exhibits a certified copy of his letters of administration and an unverified copy of the inventory subsequently approved by the court on March 9, 1942.* The bill averred that appellant as administrator of the estate was then the lawful owner of the entire right, title and interest, legal and equitable, in the assets and securities heretofore described which it stated had a value of $120,000 (R. 3); that because of the complex facts as to the domicile of decedent, it would be impossible for either the Probate Court of Cook County or the court of the forum to determine his true domicile "except by evidence to be presented in said Probate Court or in this Court in the event the question of domicile of the decedent shall be relative to this proceeding" (R. 4); that decedent left no debts of any kind in the United States except in the State of Illinois (R. 4), and that he had never actually been in the United States except as a temporary visitor many years before his death (R. 5); that administration of his estate had been sought in England and Brazil, and possibly in the Irish Free State, France and Monaco, and that no such probate proceedings were pending in any state of the United States outside the Probate Court of Cook County, Illinois (R. 5); that respondent was on the date of the death of decedent the mere custodian of the securities, having no interest in them (R. 5), and that the estate in Cook County had assets

*The original bill of complaint and the date of its filing do not appear in the record herein, but do appear in the record in Nos. 662 and 663, October Term, 1942. Paragraphs 1-9 of the amended and supplemental complaint (R. 2) comprise the allegations of the original complaint.

not to exceed $250, other than the securities, and that the allowed claims against the estate were in excess of $7,500, hence the estate was and would be wholly insolvent unless it obtained the relief prayed in the bill (R. 5).

There were other averments as to petitioner's demand and respondent's refusal to turn over the securities (R. 5), their negotiability (R. 4), their fluctuating value and the danger that such value might be wiped out if the war terminted adversely to the Kingdom of Great Britain (R. 6); that respondent might attempt to institute temporary proceedings in some probate or surrogate court other than that of Cook County, thereby causing unnecessary loss, damage, costs and other expenses, and might prevent the prompt disposition or sale of the assets under order of the Probate Court of Cook County (R. 8). Petitioner therefore prayed that respondent be ordered to deliver over all the securities in its custody, or in the alternative, that it pay over the fair market value of such securities together with damages for their detention and the costs of the proceeding (R. 11). It also prayed that respondent be temporarily and permanently restrained from disposing of the securities, and from instituting any proceedings relating thereto in any court other than the Probate Court of Cook County (R. 11).

Subsequently, on May 26, 1942, petitioner amended his original bill, adding the further averments that on the date of decedent's death, there was on deposit in a special account in a Chicago bank, funds in excess of $500 and less than $6,000, placed there in September, 1940, and remaining since that date, not then reduced to possession by petitioner (R. 7) (The source of such funds is not shown nor why their existence in Chicago was not earlier known to Fisher who, as an item of the services rendered decedent for which his claim for $7,513.77 was allowed, alleged the "freeing, the unblocking and transfer from New York and

Chicago to (decedent) in Dublin and London and elsewhere" of sums aggregating $743,000 between August, 1940 and May, 1941 (R. 75)) (See R. 145-146); that no inheritance or other taxes were or would become due to the State of New York, and offering to procure a tax waiver from the proper authorities (R. 7-8); that under the New York laws, none of its courts had the power to distribute the assets of the estate, but that their sole power was to pay any existing debts due to New York creditors (of which the bill averred there were none), and then to remit the balance to the domiciliary administrator or executor of the estate (R. 8-9); that New York administration would result in unnecessary expense (R. 9). Petitioner in his bill also offered to pay the sum of $10.43 alleged to have been claimed as custodial fees for respondent's services, although he stated that fees theretofore paid were excessive in view of the value of the securities in its charge (R. 9); and that a "petition was filed in the Surrogate's Court of New York for letters of administration of the estate of said decedent by a niece of the decedent, but said petition has never been granted and no administration has ever been commenced by appointment of a representative of said estate in the State of New York," and no other action had been taken, and that court had not acquired any jurisdiction *in personam* over any representative of the estate or any jurisdiction *in rem* over any assets of the decedent (R. 10-11).

By his amended notice of appeal, filed December 18, 1942, petitioner appealed from the orders entered as of November 18, 1942, denying his motion for a temporary restraining order and a preliminary injunction and allowing respondent's motion to dismiss the amended and supplemental complaint, as amended. In the Circuit Court of Appeals Norman Crawford and Thomas Hart Fisher ap-

peared as attorneys on behalf of petitioner (R. 131, 139, 140).

Referring to the misleading statement in petitioner's "Summary Statement of Matters Involved", we call the Court's attention to the statement "Petitioner alleged that he was without knowledge as to the physical location of the certificates evidencing the securities sued for, but that (except for possible reference thereto) there were no assets or securities belonging to decedent in New York upon which any administration proceedings could be based." (P. 3). The cardinal fact of this case is that the securities for the possession of which this suit is brought were deposited by the decedent during his lifetime in the custody of respondent in New York, were located in respondent's vaults in New York at the date of the decedent's death and still remain there (R. 27, 36, 89, 142). Furthermore, petitioner's entire brief proceeds upon the assumption that the decedent did not leave these securities in Illinois but did leave them in New York.

On this state of facts, the question presented is as follows:

> Whether the ancillary administrator in Illinois of the estate of a non-resident alien decedent can compel the custodian of tangible personal property left by the decedent in New York, and still remaining there, to surrender it to him solely by virtue of the fact that the Illinois administrator can sue the New York custodian in a Federal court in Illinois, because the New York custodian is licensed as a foreign corporation to do business in Illinois.

We believe that the answer to this question must be in the negative and that the petition for a writ of certiorari should therefore be denied.

SUMMARY OF ARGUMENT.

I.

The amended and supplemental complaint, as amended, does not state grounds upon which relief can be granted because the securities involved in this case have no situs for administration in Illinois.

Ill. Rev. Stat. (1941) c. 3, § 207.
Goodrich, "Problems of Foreign Administration," 39 Harv. L. Rev. (1926) 797.
Story, Conflict of Law (8th ed. 1883) § 514.
3 Beale, Conflict of Laws (1935) § 471.5.
Mager v. *Grima*, 8 How. (U. S.) 490.
U. S. v. *Perkins*, 163 U. S. 625.
U. S. v. *Fox*, 94 U. S. 315.

II.

The only situs for the administration of the securities involved in this case is New York.

Iowa v. *Slimmer*, 248 U. S. 115.
In re Cornell's Will, 267 N. Y. 456, 196 N. E. 396.
Higgins v. *Eaton*, 202 Fed. 75; cert. den. 229 U. S. 622.
Tilt v. *Kelsey*, 207 U. S. 43.
Helme v. *Buckelew*, 229 N. Y. 363, 128 N. E. 216.
Overby v. *Gordon*, 177 U. S. 214.
Riley v. *New York Trust Co.*, 315 U. S. 343.
New England Mut. Life Ins. Co. v. *Woodworth*, 111 U. S. 183.
Irving Trust Co. v. *Day*, 314 U. S. 556.

III.

Answer to certain arguments of petitioner:

1. Answer to petitioner's argument that respondent could not be held liable in New York for wrongfully disposing of these securities by surrendering them to an administrator appointed by the court of a state having no jurisdiction over them.

Thompson v. *Whitman*, 18 Wall. (U. S.) 457.

Pennoyer v. *Neff*, 95 U. S. 714.

U. S. Const., Amendment 14, § 1.

2. Answer to petitioner's argument that no proceeding for administration of these securities is pending in the Surrogate's Court of New York.

Surrogate's Court Act, §§ 40, 44, 45, Clevenger's Practice Manual (1942).

Matter of Feinberg, 155 Misc. 844, 280 N. Y. Supp. 540.

Matter of Thorne, 123 Misc. 621, 206 N. Y. Supp. 69.

Matter of Daniels, 140 Misc. 89, 249 N. Y. Supp. 436.

Matter of Humpfner, 146 Misc. 461, 263 N. Y. Supp. 309.

Matter of Maginn, 215 App. Div. 790, 213 N. Y. Supp. 325.

Matter of Browning, 153 Misc. 564, 276 N. Y. Supp. 270.

Matter of Stephani, 164 Misc. 240, 300 N. Y. Supp. 813.

Matter of Mills, 171 Misc. 42, 11 N. Y. S. (2d) 929.

3. Answer to petitioner's arguments:

(a) That the New York Surrogate's Court has no power to distribute an ancillary estate in New York directly to

beneficiaries without transmission to the domiciliary administrator.

Surrogate's Court Act, §§ 159-166, Clevenger's Practice Manual (1942).

Despard v. *Churchill*, 53 N. Y. 192.

Dammert v. *Osborn*, 140 N. Y. 30, 35 N. E. 407; 141 N. Y. 564, 35 N. E. 1088.

In re Ryan's Will, 136 Misc. 261, 241 N. Y. Supp. 82.

Howard v. *Marlin-Rockwell Corp.*, 156 Misc. 358, 281 N. Y. Supp. 666.

In re Marinano Estate, 158 Misc. 825, 286 N. Y. Supp. 811.

In re Hughes, 95 N. Y. 55.

In re Rogers' Will, 225 App. Div. 286, 232 N. Y. Supp. 609; aff'd 254 N. Y. 592, 173 N. E. 880.

In re Martin's Will, 255 N. Y. 359, 174 N. E. 753.

Smith v. *Second National Bank*, 169 N. Y. 467, 62 N. E. 577.

U. S. Trust Co. v. *Wood*, 146 App. Div. 751, 131 N. Y. Supp. 427.

In re Meyer's Estate, 125 Misc. 361, 211 N. Y. Supp. 525; 244 N. Y. 598, 155 N. E. 913.

(b) That the New York Surrogate's Court has no power in the administration of an ancillary estate in New York to direct the payment of the claims of non-resident creditors.

In re Van Bokkelen's Estate, 155 Misc. 289, 279 N. Y. Supp. 420.

Hopper v. *Hopper*, 125 N. Y. 400, 26 N. E. 457.

In re Worch's Estate, 124 Misc. 380, 208 N. Y. Supp. 652.

In re Meyer's Estate, 125 Misc. 361, 211 N. Y. Supp. 525; 244 N. Y. 598, 155 N. E. 913.

Surrogate's Court Act, §§ 126-127, Clevenger's Practice Manual (1942).

(c) That the New York Surrogate's Court has no jurisdiction over an ancillary estate in New York in the absence of New York creditors.

Surrogate's Court Act, §§ 159-166, Clevenger's Practice Manual (1942).

(d) That administration of this ancillary estate in New York would be useless and wasteful.

In re Martin's Will, 255 N. Y. 359, 174 N. E. 753.

ARGUMENT.

I.

The amended and supplemental complaint, as amended, does not state grounds upon which relief can be granted because the securities involved in this case have no situs for administration in Illinois.

The principal defense in this case is that the assets for the possession of which this suit is brought by the Illinois administrator are and since November 4, 1940, long prior to the decedent's death, have been located in the City, County and State of New York in the vaults of respondent, and that for this reason the State of Illinois, the Probate Courts of Illinois, and the Federal court sitting in Illinois have no jurisdiction over such assets.

Under Illinois law the situs of tangible personal property of a non-resident decedent for purposes of administration is where the property is situated at his death.

Petitioner treats the kaffirs for the possession of which this suit is brought as tangible personal property rather than intangible choses in action (R. 3-4). Since these kaffirs constitute tangible personal property, it is perfectly clear under the Illinois Probate Act that an administrator appointed in that state would have no right or authority to take possession of them unless they had been left by the decedent in that state upon his death. Section 55 of this Act provides as follows with regard to the personal estate of a non-resident decedent:

> "§ 55. Situs of Personal Estate of Non-resident Decedent. For the purpose of granting administration of both testate and intestate estates of non-resident decedents, the situs of tangible personal estate

> is where it is located and the situs of intangible estate is where the instrument evidencing a debt, obligation, stock or chose in action happens to be, or where the debtor resides, if there is no instrument evidencing the debt, obligation, or chose in action in this state."
>
> Ill. Rev. Stat. (1941) c. 3, § 207.

But whether tangibles or intangible choses in action, these securities have no situs for administration in Illinois, since the kaffirs evidencing ownership in the South African gold mining corporations "happen to be" in New York.

It therefore seems perfectly clear that under Illinois law there is no jurisdiction for the ancillary administrator to seek to reach out beyond the borders of Illinois and draw into his possession tangible personal property left by the decedent in New York.

The section from the Illinois Probate Act which we have quoted above (Respondent's Brief, 15-16) does nothing more than state the common law rule of conflict of laws. It is universally recognized that an administrator appointed for one state or country cannot reach out beyond the jurisdiction of the state or country from which he derives his authority in order to collect foreign assets.

Judge Goodrich, in an article in the Harvard Law Review, states the law as follows:

> "It seems clear that property left in a state at the death of the owner is subject to that state's control, no matter where the domicil of the owner happened to be. Appointment of a representative at that domicil cannot make him the owner of the property; the law of the situs must do that, if it is to be done. Judicial language expressing this idea is plentiful. 'It is a principle of almost universal jurisprudence, recognized in England as well as in the American courts, with scarcely an exception, that the title of an executor or administrator does not extend beyond the territory of the government which grants it.' 'Nor can it (the

state of the domicil) invest the administrator with title to any movable property, except to such as may be found within its limits.' The state where the property is located may be concerned with it in several ways. One is with regard to taxing the succession. Another is that the property shall, before being distributed, be subjected to the payment of such claims as creditors may present. Another is that the state may claim it as *bona vacantia*, if there are no next of kin. And finally, the state may, though it seldom does, insist that it be distributed according to its rules, regardless of the domicil of the decedent."

Goodrich, "Problems of Foreign Administration," 39 Harv. L. Rev. (1926) 797, 812.

Also:

Story, Conflict of Law (8th ed. 1883) § 514.

3 Beale, Conflict of Laws (1935), § 471.5

Mager v. *Grima*, 8 How. (U. S.) 490, 493.

U. S. v. *Perkins*, 163 U. S. 625.

See:

U. S. v. *Fox*, 94 U. S. 315, 320.

The Circuit Court of Appeals is in accord with the decisions of this Court and all the authority on the question when it says in its opinion, referring to petitioner:

"By his grant of ancillary letters of administration he obtained only a special and limited authority to act in collecting and disposing of such personal property as the decedent left within the confines of the State of Illinois. 11 R. C. L. on Executors and Administrators, § 529; Woerner, American Law of Administration, 3rd Ed. Vol. I, § 157." (R. 147.)

II.

The only situs for the administration of the securities involved in this case is New York.

A necessary corollary of the rule that only the property within the jurisdiction of the state in which the probate court is sitting can be administered by that probate court is that the state in which a decedent's personal property is located at his death has an absolute right to administer that property through its probate proceedings. This is a sovereign right inherent in the state and enables the state to protect its creditors, its taxing authorities and those persons it recognizes as entitled to inherit, and in the event of an intestate dying without heirs, its own right to succeed to the property by escheat. Yet the claim of petitioner in this case is that because the Probate Court of Cook County has issued to him letters of administration upon certain assets in Illinois and because respondent is amenable to suit in the Federal Court in Illinois by service of process on its Illinois agent he can remove securities from the State of New York.

That he cannot do so is affirmatively demonstrated by *Iowa* v. *Slimmer*, 248 U. S. 115, 120-121.

In that case the decedent, domiciled in Iowa, removed a half million dollars worth of personal property to Minnesota, anticipating death and desiring to avoid Iowa inheritance taxes. Administration was taken out in Minnesota and the Minnesota executors refused to deliver any of these assets either to the State of Iowa or to the personal representatives appointed there. Iowa then brought a suit in the United States Supreme Court against the State of Minnesota and the Minnesota executors under the Supreme Court's original jurisdiction of suits between states. The

motion for leave to file the suit was denied on the merits after full argument of the case. Justice Brandeis said:

> "Substantially the whole of decedent's estate consisted of notes and bonds. Under an arrangement which had been in force for five years or more, these securities were, at the time of his death, in Minnesota in the custody and possession of an agent resident there. Minnesota imposes inheritance taxes; and its statutes provide (Minnesota Gen. Stats., 1913, § 2281) that no transfer of the property of a nonresident decedent shall be made until the taxes due thereon shall have been paid. Regardless of the domicil of the decedent, these notes and bonds were subject to probate proceedings in that State and likewise subject, at least, to inheritance taxes. Minnesota Gen. Stats., 1913 §§ 7205, 2271; *Bristol* v. *Washington County*, 177 U. S. 133; *Wheeler* v. *New York*, 233 U. S. 434. Furthermore, so far as concerns the property of the decedent, located at his death in Minnesota, the probate courts of that State had jurisdiction to determine the domicil. *Overby* v. *Gordon*, 177 U. S. 214. But even if decedent was not domiciled in Minnesota, its court had the power either to distribute property located there according to the terms of the will applicable thereto, or to direct that it be transmitted to the personal representative of the decedent at the place of his domicil to be disposed of by him. Minnesota Gen. Stats., 1913, § 7278; *Harvey* v. *Richards*, 1 Mason, 381. See *Wilkins* v. *Ellett*, 108 U. S. 256, 258."

Under the doctrine of this case, therefore, the State of New York could not be required either in its own courts, the courts of any other state, or in the courts of the United States to transmit assets to any other state even if such other state were the domicile of the decedent, but the State of New York could distribute such assets, pursuant to its laws, in any way it saw fit.

Also:

In re Cornell's Will, 267 N. Y. 456, 466, 196 N. E. 396, 400.

Higgins v. *Eaton*, 202 Fed. 75, 77; cert. den. 229 U. S. 622.

Tilt v. *Kelsey*, 207 U. S. 43.

Helme v. *Buckelew*, 229 N. Y. 363, 128 N. E. 216.

It follows from the fact that the state in which a decedent's property is located has an absolute right to administer it that one state cannot encroach upon the sovereignty of another by empowering an administrator appointed by it to remove from the other state property left there by the decedent. The State of Illinois has no sovereign power to authorize an administrator appointed by its Probate Court to remove these "kaffirs" from the sovereign State of New York.

Overby v. *Gordon*, 177 U. S. 214.

Riley v. *New York Trust Co.*, 315 U. S. 343, 349-350, 352-354.

In view of these cases we think it is clearly demonstrated that the Probate Court of Cook County and the Federal court sitting in Illinois do not have jurisdiction over the securities which are the subject matter or *res* involved in this case. These courts, therefore, cannot adjudicate in this or in any other proceeding the alleged claims of petitioner in and to the securities. Rather the Federal courts sitting in Illinois must leave to the properly constituted courts of the State of New York, within the jurisdiction of which the securities are located, the adjudication of any and all such alleged claims.

Petitioner argues extensively that he is entitled to get possession of this tangible property left by the decedent in New York by virtue of the fact that he has been able to serve the New York custodian of the property with process

in Illinois, thereby subjecting the custodian to the jurisdiction of the Federal court sitting in Illinois (Petitioner's Brief, 9-17).

New England Mut. Life Ins. Co. v. *Woodworth*, 111 U. S. 138, the case upon which petitioner principally relies (for companion cases, see Petitioner's Brief, 9-13), is as follows, as stated by the Circuit Court of Appeals:

> "It held that the Illinois-domiciled husband of a New York-domiciled wife might, upon her death, obtain letters of administration in Illinois upon a showing of property belonging to her, consisting of an insurance policy payable to her, her executors or administrators, which he held in Illinois, giving him a claim as administrator against the insurer, qualified to do business in Illinois, and that being the case, sufficiently domiciled there to make its policy which created a simple contract debt, an asset there for the purposes of administration. This is in no way analogous to the situation here involved." (R. 147.)

Respondent owes the decedent's estate no money. There are simply securities left by the decedent in New York. Whether these securities, as in petitioner's view, are tangibles or whether they are intangibles represented by stock certificates, since the decedent was not domiciled in the United States and the kaffirs evidencing the decedent's ownership in the South African corporations were left by him in New York, there is absolutely no point of contact between these securities and the State of Illinois.

The fact that respondent has been served with process in Illinois does not change its relation to this decedent from that of a bailee to that of a debtor. Before the death of the Vicomte the relationship between him and respondent was that of bailor and bailee (Cf. Petitioner's Brief, 14). However, on his death the title to these securities devolved not on any administrator appointed through its probate courts by the State of Illinois, but rather on such

persons as the State of New York pursuant to its laws may adjudge to be their lawful owner. Therefore the defense in this action is that petitioner as administrator *de bonis non* in Cook County has no title or right of ownership in and to these securities and that the State of New York has the right to impose such restrictions on their transfer as it wishes or limit their transfer in any way it sees fit. *Irving Trust Co.* v. *Day*, 314 U. S. 556, 562.

The true rule is that in no matter how many states and foreign countries this respondent can be found by the service of process upon its agents, nevertheless the one and the only state which has jurisdiction to administer upon these kaffirs left in its custody by a person subsequently dying is the state where such kaffirs are physically located. That state is New York.

As pointed out by the Circuit Court of Appeals, the fallacious point in petitioner's reasoning is where he argues that he stands in the shoes of the decedent with respect to this property (R. 147). The point is that petitioner does not stand in the shoes of the decedent. Petitioner only has whatever right to these securities the Probate Court of Cook County gave him. Because the situs for the administration of these securities was not in Illinois, the Probate Court of Cook County lacked jurisdiction to give plaintiff any right to these securities. The only person who can stand in the shoes of the decedent, so far as these securities are concerned, is an administrator appointed in the state where they were located at the date of his death, namely, New York.

As the Circuit Court of Appeals said in its opinion:

> "Appellant appears to think that he stands in the shoes of decedent and holds all rights which would have been enforcible by decedent. Such is far from the case. * * * Certainly the Woodworth case does not contemplate that a public administrator obtaining an-

> cillary letters upon an allegation of property in the state at the time of a non-resident decedent's death, may thereupon require that all property belonging to his decedent in other foreign states be brought into the state for him to administer. That there are allowed claims of Illinois creditors which cannot otherwise be paid in Illinois does not enlarge his authority." (R. 147.)

Petitioner argues that a court of equity may by its decree require a defendant to take action affecting property in another state (Petitioner's Brief, 13), and he further endeavors to assimilate this case to the situation presented by *New England Mut. Life Ins. Co.* v. *Woodworth* by saying that an action in detinue is for money as well as for property if the property is damaged or withheld (Petitioner's Brief, 15). His theory here is that, since an equity court may in a proper case require a defendant to take out-of-state action, a debt is created having a situs for administration in Illinois upon the refusal of respondent to surrender this property to petitioner. Again we urge that the conclusion does not follow from the premise.

We readily concede that in a proper case an equity court may enter a decree *in personam* affecting property not within its jurisdiction. But such a decree, to be proper, can only be for the enforcement of the rights of the person lawfully entitled to such property. We likewise concede that where a bailee wrongfully withholds property from its true owner, an action of detinue will lie, leading to a money judgment, but this is only true when property is withheld from the proper owner. If property is withheld from a person who is not entitled thereto, as in the case at bar, it is obvious that that person cannot sue to collect a money judgment because of the bailee's refusal to surrender the property. The right to collect a money judgment only arises in favor of the person lawfully entitled to the prop-

erty. As we have demonstrated, the petitioner in this case has no right to the property because the Probate Court of Cook County was entirely without jurisdiction to give it to him. Thus the attempted analogy with *New England Mut. Life Ins. Co.* v. *Woodworth* entirely fails.

III.

In view of the argument above we do not believe that anything more need be said to show that the decisions of the District Court and the Circuit Court of Appeals in this case were correct, and there is no occasion for this Court to grant the writ of certiorari sought by petitioner. However, there are certain statements in Petitioner's Brief which, lest they lead this Court to the belief that there is some equity in petitioner's case, we cannot permit to go unchallenged. We now take these up briefly and in the order in which they appear in Petitioner's Brief.

1. Petitioner says that we argued in the courts below that respondent "would not be protected from double liability in New York or elsewhere if the Illinois Federal Court in this case entered an *in personam* decree against the respondent", and that this argument "was not sustained in the Circuit Court of Appeals." (Petitioner's Brief, 16). We urged upon the District Court and the Circuit Court of Appeals our view that if a court sitting in Illinois should order this respondent to surrender securities over which neither the Probate Court of Cook County, Illinois, nor the Federal District Court sitting in Illinois have any jurisdiction whatsoever, a court sitting in New York would not be required to respect such a decree, and that respondent might later be held liable in some New York court, whether at the suit of the decedent's New York heirs, if any, the New York State Tax Commission, other and now unknown New York creditors, or any other per-

sons who might ultimately be held by a court of New York to have an interest in the decedent's New York estate. We were of this view because it has always been held that the jurisdiction of a court to enter a decree may be attacked collaterally and a decree rendered by a court having no jurisdiction need not be accorded faith and credit by other tribunals.

Thompson v. *Whitman*, 18 Wall. (U. S.) 457.
Pennoyer v. *Neff*, 95 U. S. 714.

We therefore gave as an additional argument below that thus to subject respondent to a double liability would be a deprival of its property without due process of law contrary to the Fourteenth Amendment of the United States Constitution.

U. S. Const., Amendment 14, § 1.

Furthermore, in our brief in the Circuit Court of Appeals we analyzed every one of the cases cited by petitioner (Petitioner's Brief, 16-17), and demonstrated that they do not support his view that if respondent should surrender these securities pursuant to the decree of a court sitting in Illinois having no jurisdiction over them, such decree would be a bar to any other claim against respondent on their account.

However, the Circuit Court of Appeals did not find it necessary to refer to our argument on this point because of its holding that an administrator appointed in Illinois has no jurisdiction to collect tangible personal property left by a decedent in New York. Therefore it does not appear to us that petitioner can now say that our argument in this respect "was not sustained in the Circuit Court of Appeals." Moreover any inference that our argument on this point was examined and rejected by that court is entirely false.

2. Petitioner chides us, and also the District Court and

the Circuit Court of Appeals, for taking the position that a proceeding for the administration of these securities is already pending in the Surrogate's Court of New York (Petitioner's Brief, 18-20; R. 113, 147), especially as our view on this point, and the view of the courts below, is directly contrary to the allegation in the amended and supplemental complaint that no administration proceedings are pending in New York "because no appointment of an administrator and no other action has ever been taken in said proceedings," and because "said Surrogate Court of New York has not acquired any jurisdiction *in personam* over any representative of said estate or any jurisdiction *in rem* over any assets or securities or other properties of Gabriel de Fontarce whatsoever." (R. 10, Petitioner's Brief, 20).

Under New York law probate administration is commenced and the Surrogate's Court acquires jurisdiction as soon as an application for letters has been filed and prior to the appointment of an administrator.

Surrogate's Court Act, §§ 40, 44, 45, Clevenger's Practice Manual (1942).

Matter of Feinberg, 155 Misc. 844, 845, 280 N. Y. Supp. 540, 541.

Matter of Thorne, 123 Misc. 621, 206 N. Y. Supp. 69.

Matter of Daniels, 140 Misc. 89, 249 N. Y. Supp. 436.

Matter of Humpfner, 146 Misc. 461, 263 N. Y. Supp. 309.

Matter of Maginn, 215 App. Div. 790, 213 N. Y. Supp. 325.

Matter of Browning, 153 Misc. 564, 276 N. Y. Supp. 270.

Matter of Stephani, 164 Misc. 240, 300 N. Y. Supp. 813.

Matter of Mills, 171 Misc. 42, 11 N. Y. S. (2d) 929.

The Circuit Court of Appeals, in dealing with petitioner's argument that no proceeding is pending for the administration of the securities in New York, said:

> "Appellant proceeds on the theory that a proceeding initiated in New York for ancillary administration could be and was abandoned by the petitioning alleged heir, and that thereafter the New York Surrogate's Court lost all jurisdiction over the proceeding and the assets, although its records showed that the proceeding was still pending and the published opinion of the Surrogate showed that he was holding it in abeyance pending receipt of further information necessary to a correct decision, and of course, the assets remained in New York. We cannot agree with appellant's theory. That court had assumed jurisdiction upon the filing of the petition which it stated was filed on the theory that the decedent died intestate; it was its duty to retain that jurisdiction for the purpose of administering the assets within the state or transmitting them to the domiciliary executor or administrator when his identity was ascertained." (R. 147-148.)

It is obvious that a proceeding for the administration of these assets is presently going on in New York, since the Surrogate has rendered an opinion holding the decedent's niece's application "in abeyance" and the clerk of the Surrogate Court has certified that the matter is still pending (R. 55, 56).

3. Petitioner argues that ancillary administration in New York would be "utterly useless and wasteful of the assets concerned and would be beyond the power or authority of the Surrogate Court of New York" basing his opinion upon the proposition that the New York Surrogate's Court has no power to make a final distribution of the assets directly to the decedent's ultimate heirs or distributees and has no authority to direct the payment of the claims of non-resident creditors and the further propo-

sition that no ancillary administration is lawful in New York unless there are New York creditors (Petitioner's Brief, 18-19). Petitioner's argument as to the New York law on these points is entirely wrong.

(a) The Surrogate's Court has complete power to distribute an ancillary estate in New York directly to beneficiaries without transmission to the domiciliary administrator.

Surrogate's Court Act, §§ 159-166, Clevenger's Practice Manual (1942).

Despard v. *Churchill*, 53 N. Y. 192, 199.

Dammert v. *Osborn*, 140 N. Y. 30, 35 N. E. 407; 141 N. Y. 564, 35 N. E. 1088.

In re Ryan's Will, 136 Misc. 261, 264, 241, N. Y. Supp. 82, 85.

Howard v. *Marlin-Rockwell Corp.*, 156 Misc. 358, 360, 281 N. Y. Supp. 666, 669.

In re Marinano Estate, 158 Misc. 825, 827, 286 N. Y. Supp. 811, 813.

In re Hughes, 95 N. Y. 55.

In re Rogers' Will, 225 App. Div. 286, 232 N. Y. Supp. 609; aff'd 254 N. Y. 592, 173 N. E. 880.

In re Martin's Will, 255 N. Y. 359, 362-363, 174 N. E. 753.

See:

Smith v. *Second National Bank*, 169 N. Y. 467, 62 N. E. 577.

U. S. Trust Co. v. *Wood*, 146 App. Div. 751, 131 N. Y. Supp. 427.

In re Meyer's Estate, 125 Misc. 361, 211 N. Y. Supp. 525; 244 N. Y. 598, 155 N. E. 913.

Whether distribution will be made direct or the assets remitted to the domiciliary administrator rests entirely within the discretion of the Surrogate.

(b) Furthermore, the Surrogate's Court has complete power in the administration of an ancillary estate to direct the payment of the claims of the decedent's non-resident creditors.

In re Van Bokkelen's Estate, 155 Misc. 289, 293-294, 279 N. Y. Supp. 420, 425.

Hopper v. *Hopper*, 125 N. Y. 400, 404, 26 N. E. 457, 458.

See:

In re Worch's Estate, 124 Misc. 380, 208 N. Y. Supp. 652.

In re Meyer's Estate, 125 Misc. 361, 211 N. Y. Supp. 525; 244 N. Y. 598, 155 N. E. 913.

Again, it is a matter for the Surrogate's discretion, whether nonresident creditors shall be paid direct or must look to the domiciliary administrator. We would not suggest that the claim of Thomas Hart Fisher for $7,513.77 for alleged legal services should be allowed by the Surrogate's Court, but it is clear that the Surrogate's Court has jurisdiction to entertain such a claim, and, if proved, to permit its satisfaction out of the decedent's New York estate.

Furthermore, in the event that a long delay in determining whether the decedent died testate or intestate with respect to his New York property should occur and no appointment of an administrator could under New York law be made for sometime, any danger resulting to the estate by reason of the fluctuating value of these assets may be avoided under the provisions of Sections 126 and 127 of the Surrogate's Court Act, which provide for the appointment of a temporary administrator and the immediate liquidation of property, if necessary. In speaking of these sections of the Surrogate's Court Act, the Circuit Court of Appeals said:

"Due to the exigencies of the war, it may be some time before final determination (as to whether dece-

> dent died testate or intestate as to his New York estate) may be had. In the meantime, if it appears that the delay is likely to result in loss to the estate, under the provisions of section 126 of the Surrogate's Court Act, a temporary administrator may be appointed on the application of a creditor or a person interested in the estate, and by section 127, this administrator may be authorized by the surrogate to sell such personal property as it appears to be necessary to sell for the benefit of the estate. Hence we find no basis for appellant's apprehension of loss if the assets are not removed from New York and brought under the jurisdiction of the Probate Court of Cook County, Illinois."

(c) The jurisdiction of the Surrogate's Court to administer the assets of a non-resident decedent does not depend upon the presence or absence of creditors in New York, but depends upon the presence or absence of property in New York. Surrogate's Court Act, §§ 159-166, Clevenger's Practice Manual (1942). It is notable that of five cases cited by petitioner on this point only one is a New York case and this does not support him (Petitioner's Brief, 18).

(d) Petitioner is right in his belief that the policy of the New York courts is opposed to useless and wasteful duplication of administrations (Petitioner's Brief, 19). However, petitioner has so twisted the application of Judge Cardozo's opinion in *In re Martin's Will*, 255 N. Y. 359, 174 N. E. 753, as to give that case an absurd application. In that case the New York Court of Appeals affirmed the Surrogate's Court in granting direct distribution and in refusing to remit the ancillary New York estate to the domiciliary administrator in Connecticut. The Court said:

> "The state of Connecticut has petitioned the Surrogate's Court of the County of New York to direct the executor of a will to remit the assets of the estate to an administrator c. t. a., appointed in Connecticut, the domicile of the testatrix.* * *

"The Surrogate in denying the petition placed his ruling upon two grounds. He held that to return the assets for such a purpose would be equivalent to the enforcement by one state of the tax laws of another, *State of Colorado* v. *Harbeck*, 232 N. Y. 71, 133 N. E. 357. He held, apart from that principle, that the relief should be refused in the exercise of a sound discretion, since compliance with the demand would result in a depletion of the assets by the unnecessary expenses of a double administration. The Appellate Division unanimously affirmed." * * *

"Return, even though not forbidden by a hard and fast rule, is certainly not relief to be demanded as of right. At most, it is to be granted or refused in the exercise of a discretion that will give heed to all the facts. *Matter of Hughes*, 95 N. Y. 55, 60; cf. *Matters of Roger's Will*, 225 App. Div. 286, 232 N. Y. S. 609; Id., 254 N. Y. 592, 173 N. E. 880. The executor in New York conveyed repeated offers to the taxing officers in Connecticut to make payment of any tax found owing at the domicile. What he refused was a wasteful duplication of administrations and accountings. In the review of such an order the jurisdiction of this court is limited to a determination of the law. Discretion is not revised except for manifest abuse."

We submit that this case furnishes no possible support for petitioner's argument that an administrator appointed in Illinois, and an ancillary administrator at that, can go to New York and remove the decedent's property there without so much as a "by your leave" to the New York Surrogate's Court, New York creditors, and respondent, which is custodian of the property and will be answerable in New York with regard to its proper disposition.

As to the alleged wastefulness of administration in New York, if petitioner should win this case, one-fourth of the entire estate would be paid to his counsel as attorney fees (R. 79). The remainder of the assets would then become liable to satisfy the claim of Thomas Hart Fisher

for $7,513.77 for alleged legal services, which was allowed by the Probate Court of Cook County on the same day that petitioner was appointed administrator, and at a time when the only inventoried assets subject to administration in Illinois consisted of clothing and medicine appraised at a value of $50.25 (R. 13, 80). Finally, petitioner would collect fees for handling securities of large value none of which were in Illinois at the date of the decedent's death.

Conclusion.

From what has been said, it is clear that both the order of the District Court denying petitioner's motion for a temporary restraining order and a preliminary injunction and the order allowing respondent's motion to dismiss the amended and supplemental complaint, as amended, for failure to state grounds upon which relief could be granted, were correct, and were properly affirmed by the Circuit Court of Appeals for the reason that petitioner as ancillary administrator in Illinois has no right, title or interest in and to tangible personal property or securities left by a nonresident alien decedent in the custody of respondent in New York, notwithstanding the fact that respondent is licensed to do business in Illinois. For this reason we submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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